development aid and international development policies. The government should put additional efforts to involve different actors—civil society, national statistics office, private sector, academia etc—and benefit from their input.

As regards indicators of performance, both quantitative data relating to formal, informal and alternative dispute mechanisms, and qualitative data based on experience surveys reflecting the users' confidence and satisfaction with the justice system need to be incorporated in evaluation processes. This reflects an increasing acknowledgment across European countries. Additional efforts are nevertheless needed in this regard, including efforts to harmonise statistics in order to measure regional and global progress. Equally important for both the assessment of performance and comparative purposes is the collection of disaggregated data by groups of users and by type of mechanism. In this latter regard, the UK will have to put in place additional efforts and scale up the collection of relevant data in relation to non-court based mechanisms for resolving disputes and related—formal and informal—sources of advice and assistance. While acknowledging that resources are limited, the government should identify existing data sets and consider whether new data sets or extensions to existing sets are needed.

Finally, assessment of performance will require clear national leadership on the SDGs process and on Goal 16, including strong rules on the infrastructure for collecting the data and reporting modalities in the UK, the role of the Office for National Statistics, and coordination with existing monitoring and reporting mechanisms. Clarity is also required with regard to monitoring procedures, where civil society's progress assessment should be formally allowed to complement governmental evaluation.

Dr Julinda Beqiraj
Associate Senior Research Fellow, *Bingham Centre for the Rule of Law*

Still undignified rights: a disagreement with Benedict Douglas

Human dignity; Human rights; Legal positivism; Morals and law

In his recent article,[1] Benedict Douglas identifies two problems with UK human rights law. First, he argues that human rights law is insufficiently morally grounded. The Human Rights Act 1998 (HRA) is divorced from the moral values underpinning human rights because it references the European Convention on Human Rights (ECHR) instead of making an independent substantive declaration (p.244). Second, Douglas identifies a problem with the "precariousness" of human rights law in the UK: trenchant opposition and a lack of "ownership" has a destabilising effect (p.242). According to Douglas, these problems are connected. Failing to explicitly ground human rights law in morality contributes to widespread opposition and the ensuing precariousness of human rights law. Unless a grounding in human dignity is recognised by statutory amendment or judicial engagement, "the position of

[1] Benedict Douglas, "Undignified Rights: The Importance of a Basis in Dignity for the Possession of Human Rights in the United Kingdom" [2015] P.L. 241 (hereinafter cited in parenthesis)

[human] rights will remain precarious" (p.242). In this paper I argue that, while Douglas' aim is commendable, his proposal is flawed. The root of the problem is a failure to heed his own demand to engage fully with the moral foundations of human rights. This failure leads to two further problems. First, Douglas' proposal fails to sufficiently differentiate human rights law from other positive law in theory. Secondly, the proposed grounding fails to properly address the concerns of critics of human rights law. I conclude that proponents of human rights need to go further than Douglas proposes, and engage in substantive moral justification of human rights.

Douglas' positivist proposal

Douglas identifies an important deficiency in the perception human rights: their moral significance is neglected. It is important as a matter of principle to recognise the moral foundations of human rights. There is a broad acceptance that human rights are morally important amongst theorists. When something has moral value, there is a prima facie reason to recognise that value. There is also an obvious pragmatic advantage to understanding and explaining the moral importance of human rights. It is incumbent upon supporters of the HRA and other human rights documents to justify their special legal status. It is inordinately difficult to do so without appealing to the pre-legal significance of human rights. Constitutional arguments for the special status of human rights law can demonstrate its elevated legal position, but they cannot justify it. If human rights law should be distinguished from positive law generally, that distinction needs to be explained in *moral* terms.

Douglas believes there is a further reason to recognise human rights' moral grounding, namely, that the lack of explicit moral grounding encourages opposition to human rights law. Douglas argues that this deficiency would be remedied by recognising human dignity as the moral basis for possession of human rights. Douglas offers two "alternate and complimentary means" (p.251) through which legal practice should recognise dignity. He urges that any future legislative reform in the shape of a British Bill of Rights should explicitly reference dignity as human rights moral foundation (p.254–257) and that judges should cite dignity as the foundation of human rights in their judgments (p.251–254).

What does Douglas mean by "human dignity"? He suggests a "placeholder"[2] definition (p.251–52). This substantively minimal conception amounts to a claim that there is a universal and inalienable value to human beings. Human rights, possessed by virtue of our dignity, are therefore universal and inalienable. The main reason for recognising dignity as the justification of human rights is its citation in the preamble of the Universal Declaration on Human Rights (UDHR), which states

> "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

[2] The conception is borrowed from: Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 E.J.I.L. 655, 675

One might quibble that the UDHR does not cite dignity as grounding human rights but as equivalent to them: dignity *and* rights together constitute the foundation of "freedom, justice and peace".[3] Jeremy Waldron notes that the International Covenant on Civil and Political Rights (ICCPR) is more supportive of the notion that dignity grounds human rights, stating that: "these rights derive from the inherent dignity of the human person." The ECHR does not refer to "dignity or any other deeper principled bases" (p.243), but does stipulate a moral justification for human rights: not dignity, but their instrumental contribution to "justice and peace in the world" and "greater unity between […] members [of the Council of Europe]." Douglas' textual case for adopting dignity as the philosophical justification of human rights is thus slender. In any case, Waldron is right to caution over-emphasis on the text of treaties when we are addressing philosophical questions. They are more political than philosophical, reflecting the compromise necessary to secure agreement rather than moral consensus.[4] At best, we can discern what the drafters collectively believed to be the moral foundations of human rights. Although instructive, the drafters' views about the moral grounding of human rights are not decisive. If human rights are moral rights, their grounds and content must be determined in morality, not international law.

It follows that Douglas is in danger of falling foul of one of his own central arguments. His article is scathing of those who take an overly "positivist" view of human rights. Human rights are wrongly understood "as positivist rather than universally and inalienably possessed" (p.251). Instead, we must emphasise "a non-positivist foundation for rights" (p.241). Yet Douglas' approach to locating this non-positivist foundation of human rights is itself entirely positivist. In seeking the non-positivist foundations of human rights, Douglas is content to rely on an appeal to legal authority, citing the UDHR instead of explaining why human dignity grounds possession of human rights. Douglas thus fails to satisfy his own requirement that the moral justification of human rights must be properly understood. As I shall show in the next two sections, this failure to fully engage with the morality of human rights entails that Douglas' proposal both misdiagnoses the nature of the misunderstanding of human rights and lacks the normative force to persuade opponents.

Moreover, Douglas' definition of the moral basis for the possession of human rights is more controversial than he admits. His approach risks alienating many who have endeavoured to understand the morality of human rights, since it assumes the definition of the "human" who possesses dignity to be uncontroversial. Identifying the characteristic, possessed by human beings, which makes us morally valuable is hugely controversial. A proposed characteristic must avoid both over- and under- inclusivity. So, for example, the relevant characteristic cannot be sentience, since that is an over-inclusive value which would include all sorts of non-human animals. Nor can the valuable characteristic be conscious, rational thought, since that would exclude infants and the mentally incompetent.[5] Simple

[3] Jeremy Waldron, "Is Dignity the Foundation of Human Rights?" in Rowan Cruft, Matthew S. Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press 2015), p.118

[4] Waldron, "Is Dignity the Foundation of Human Rights?" in Cruft, Liao and Renzo (eds), *Philosophical Foundations of Human Rights* (2015), p.118.

[5] John Tasioulas, "On the Foundations of Human Rights" in Cruft, Liao and Renzo (eds), *Philosophical Foundations of Human Rights* (2015)

membership of the species *homo sapiens* is also controversial,[6] since membership of a class is not in itself morally relevant: if we accept that humans should be treated differently from apes, just because they are of a different class, why should women not be treated differently from men? Douglas might argue that the placeholder conception of dignity deliberately operates at a vague level to avoid these conflicts, but these conflicts are inevitable as soon as one asks who counts as a human or what characteristic endows humans with dignity.

Distinguishing the possession from the content of human rights

In this section I shall argue that Douglas' placeholder conception of dignity is not capable of fulfilling the role he envisages for it, differentiating human rights law from other positive law. Douglas imagines a world in which law is either legal (positivist) or moral (non-positivist) in nature. The HRA is presently conceived solely as an instrument of positive law, when it should be recognised for its non-positivist moral significance. The suggested dichotomy is a gross oversimplification. Even the most hard-headed legal positivists recognise that all law has both legal and moral aspects. The widely accepted role of lawyers and judges in the UK is to interpret and apply the law as it is. Lawyers thus adopt a positivist stance to the HRA in their legal role. Outside the courtroom and legal academy, our interest is not in legal validity, but in moral justification. We are concerned with the purposes and values law reflects and the outcomes it occasions. The observation that human rights law has a moral purpose or reflects moral values does not distinguish it from any other law. The Anti-Terrorism, Crime, and Security Act, 2001, for example, specifies a moral purpose in its title: "anti-terrorism" is a good which should be pursued. And so, no serious legal positivist believes that law does not pursue ends. The positivist position is merely that legal authority is not dependent upon moral quality: law is law, irrespective of its moral value. The legal question is the realm of legal practice, and the separate moral question the realm of the public, politicians, and philosophers. Mere reference to a moral foundation of human rights, either as a basis of possession or substantive justification, will not distinguish it from other law.

Douglas' simplified view of law leads to a simplified view of the opposition to human rights law. He believes that a positivist misconception of human rights will be displaced by merely asserting a connection to morality. To overcome the widespread failure to accept the moral significance of human rights, Douglas proposes that we explicitly recognise dignity as the moral basis for the possession of human rights. This weak element of moral justification might successfully shift the debate in a world in which there is a sharp division between positivism and non-positivism. But in our world, where all law has both legal and moral aspects, the proposal reflects a misdiagnosis of the opposition facing human rights. Douglas argues that opposition results from a failure to understand that the possession of human rights is a moral matter: we tend to think possession of human rights is allocated by law, but in truth all humans possess human rights just in virtue of being human. He argues that once human dignity is recognised as the moral basis for possessing human rights, opponents will accept that human rights law is morally

[6] James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2009).

distinct from positive law more generally. Douglas is mistaken: highlighting the moral basis of possession of human rights does not distinguish them from other legal and moral rights. Dignity—human beings' inherent and inalienable value—will not justify the elevated status of human rights law, because this value equally underpins our legal personhood, the status which grounds possession of all legal rights.[7]

To illustrate, we can ask why we are all, equally, entitled to create and enforce the contractual rights established by law. The obvious *legal* answer is that we are designated as legal persons by law. But underlying the legal status are *moral* considerations, even if these are not always explicitly recognised. The endowment of legal personhood reflects a moral judgement about those who are entitled to be treated equally in the creation and enforcement of rights. Historically, the legal right reflected outdated and discriminatory moralities, which excluded many now rightly recognised to have equal moral standing. Nowadays, legal standing reflects the judgement that all humans are of equal fundamental worth. This judgement reflects our understanding of the intrinsic value of human beings: their universal and inalienable dignity.[8] As a counterpoint, imagine a contemporary legal system in which legal personhood is limited to a particular class, race, or sex. This legal system would surely be criticised for failing to recognise the moral value which underpins legal standing: humans' equal moral value, or dignity. Our understanding of the rule of law itself is premised on the intrinsic and inalienable value of human beings. The reason why a good legal system promotes equality before non-arbitrary law it that all humans—the virtuous and the vicious—have an intrinsic worth which means our interests must be respected, and one of those interests is being able to plan our lives free from arbitrary state interference.[9] Even though legal rights are created by law, the reason all humans can possess legal rights in principle is not legal. Our status as both human rights holders and legal persons has a basis in our inherent moral value. Douglas recognises humans' inherent value as the moral consideration underpinning our status as human rights-holders, but the same moral considerations underpin our status as holders of any legal rights.[10]

It might be objected that there are obvious distinctions between holding human rights and other legal rights. First, human rights are universal and inalienable: all humans hold human rights all of the time, unlike contractual rights which vary between individuals, times, and places. Secondly, human rights trump other legal and moral rights: we are not permitted to contract away our right to freedom from slavery. I agree that these distinctions exist, but disagree that the distinction is premised on divergent bases of possession. The pertinent question is not "why do all humans possess human rights?", but "why are human rights more important than other legal and moral rights?" The answer is not just that we have dignity. These rights reflect moral judgements about *what* is of value to humans, not just

[7] A similar point is made by: Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1988). Raz argues that humans' capacity to possess any legal or moral right is dependent upon their having intrinsic value.

[8] The overlap in the case of natural persons is most convincing. In the case of artificial persons, like corporations, it might be argued that the designation reflects the dignity of the natural persons who constitute the artificial person, or that designation reflects the dignity of natural persons who deal with corporations.

[9] Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012); Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

[10] This analysis explains English courts' deployment the common law conception of legal personhood as the basis for possession of human rights. This approach is criticised by Douglas (p.247–249), but according to my argument makes perfect sense.

that humans are valuable. To explain why human rights are universal and inalienable, we must explain why the interests protected by human rights are of utmost moral importance, and why they trump the interests which ground other legal protections. We must explain why no-one should ever be tortured, killed, or enslaved—even if it means invalidating a contract. Douglas' proposal avoids that question, and therefore will fail to fulfil his goal of improving understanding of the moral importance of human rights. To do so, he would have to endorse the substantive moral arguments I suggest are required.

Failing to address the opposition

In the previous section I outlined the theoretical reasons why Douglas' proposal fails to address the moral significance of human rights. In this section I shall apply Douglas' proposal to some prominent examples of opposition to human rights law and show that the proposal fails to address critics' concerns. This failure results from the supposed virtue of Douglas' proposed placeholder conception of dignity: it is a weak conception which can be endorsed by nearly all world-views. It is highly unlikely that this weak conception can exert the persuasive force necessary to convince human rights sceptics to change their minds. Douglas' proposal thus risks ineffectiveness. His proposal permits judges to do no more than assert the moral importance of human rights as self-evident. Persuasion requires a rich substantive moral argument, but that would embroil our judges in the sort of controversial moral philosophy Douglas is anxious to avoid.

Douglas claims his proposal will reduce destabilising opposition to human rights because "the deeper basis of rights as universally and inalienably possessed would be explicitly described" (p.254). As I explained in the previous section, Douglas' mistakenly explains the precariousness of human rights law as premised on an easily rectified lack of understanding of the moral basis of *possession* of human rights. On the contrary, the most prominent opposition disagrees with the moral judgements underpinning the *content* of human rights. The placeholder conception of dignity only fulfils Douglas' aim in an imaginary world where opposition is ignorant.

Douglas is most concerned with prominent opposition relating to the possession of human rights: the question of who holds human rights. This opposition most often arises when an individual benefits from the protection of human rights despite being perceived to be undeserving of protection. As Douglas notes, convicted criminals provoke most outrage, with 64 per cent of respondents to a poll in 2011[11] agreeing that "not everyone should have their human rights protected when they have broken the law" (p.247). Douglas argues that judicial or statutory recognition of dignity as the basis for human rights possession would persuade these doubters otherwise. In my view, Douglas is wrong to attribute this opposition to a misunderstanding of the nature of human rights. In fact, the view is premised on a fairly sophisticated moral judgement about the content of human rights.

The ECtHR prisoner voting jurisprudence[12] has been a prominent target for opposition to criminals' human rights. Indeed, it seems fair to conclude that

[11] *YouGov/ITV Poll*, 23–24 March 2011. YouGov, *http://cdn.yougov.com/today_uk_import/yg-archives-pol-yougovitv-humanrights-240311.pdf* [Accessed 2 August 2016].

[12] See, e.g. *Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41; 19 B.H.R.C. 546.

responses to the poll cited by Douglas were offered with prisoner voting specifically in mind: the poll was conducted one month after the tension surrounding the issue reached its peak, with the House of Commons voting to maintain the blanket ban in spite of escalating pressure from the Council of Europe.[13] We must analyse the nature of the opposition. Opponents do not deny that the right to vote is a good thing, they simply observe that it has limits. Not every human is entitled to the right to vote: most accept that young children and some foreign nationals are legitimately excluded. Opponents argue that these limits should also apply to prisoners, for reasons of public policy, justice, or both.[14]

Invoking a weak conception of human dignity will do little to defuse this opposition. Limited rights by definition exclude some humans from enjoyment when sufficient countervailing factors arise. Citing the universal value of the human will not persuade opponents that these limits should be dispensed with, or that their view on the correct limits is wrong. Douglas cannot mean that dignity entails that all are entitled to all human rights, all of the time. If so, human rights would lose all internal consistency and any credibility due to perpetual conflict. Human rights *must* therefore have limited scope, and there are disagreements as to the correct limits. Critics who believe that "not everyone should have their human rights protected when they have broken the law" (p.247) do not believe the criminal to be of no value: almost no-one would tolerate torturing criminals for fun, or hanging petty thieves. Opponents merely think that the lawbreaker's interests are outweighed by the dignity of others, justice, or the common good. When, as a result, opponents ask: "why are we *giving* rights to them?" (p.247) their question reflects a moral judgement about the relative importance of competing values. Announcing that we all have human rights because we have dignity will not shift the debate, since it simply appeals to every individual's conception of dignity. For some, dignity requires that prisoners are entitled to vote; for others, the dignity of the prisoner is outweighed by other considerations. If Douglas wants to persuade critics that criminals do possess these rights, he needs to go further than asserting the universal and inalienable possession of human rights. He needs to show that the value of the rights opponents would deny outweighs any other relevant moral considerations. To do so, we have to confront the question of the importance of human rights themselves, rather than just the question of possession.

A significant, related form of opposition concerns the institutions tasked with deciding human rights cases. This opposition is reflected in another question put to respondents to the 2011 poll: "Overall do you think human rights laws are good or bad for *British* justice?"[15] Opponents might argue that, although the ECtHR has formal, legal jurisdiction to interpret ECHR, it should not have that jurisdiction. Objectors of this sort will argue that the jurisdiction of ECtHR, in general or in specific cases, conflicts with the principles of subsidiarity or democracy. Indeed, Douglas' concern with the lack of ownership of human rights law in the UK seems to have far more to do with a perceived negative impact of European oversight than a failure to understand that human rights are grounded in human dignity. It is increasingly common for our politicians and judges to argue that the ECtHR

[13] *Hansard*, HC Deb, Vol.523, cols 493–586 (10 March 2011).

[14] The ECtHR agrees that public policy justifies limiting the vote to some prisoners, see: *Scoppola v Italy (No.3)* (2013) 56 E.H.R.R. 19; 33 B.H.R.C. 126.

[15] *YouGov/ITV Poll*, 23–24 March 2011 (my emphasis).

has been ill-suited to decide a case because it lacks sufficient knowledge of the English legal system.[16] The objection is that human rights are insufficiently parochial, not insufficiently universal. This concern with institutional legitimacy also better explains both the proposal of the Commission on a Bill of Rights that human rights be grounded in British constitutional history,[17] and the working title of the proposed British Bill of Rights.

Often these institutional arguments are premised on a relativist understanding of human rights. Critics argue that human rights are contested and the fairest way to decide on their interpretation is locally and/or democratically. Could the placeholder conception of dignity refute this criticism? UK judges might justify deferring to ECtHR by appealing to the notion that human rights are grounded in dignity and are thus universal. If rights are universal, local knowledge and accountability are irrelevant to the legitimacy of institutions deciding rights claims. It is unlikely that the placeholder conception of dignity would persuade critics. First, even if the universality of human rights is accepted, critics will argue that if rights really are universal, any court should be capable of applying them in a universal fashion. There is no need for an international court. Secondly, critics will point to the ECtHR's margin of appreciation doctrine as evidence of a moral principle of subsidiarity. It would be argued that even if rights are dignity-based and universal in principle, their interpretation must have regard the possibility of human rights conflicting, scarcity of resources, and penumbral grey-areas, and it is thus morally imperative that states may resolve these disputes for themselves. Third, those critics who claim that human rights are inherently contested will not capitulate when faced with the assertion of universality on the basis of "some deeper … value of the human person" (p.252). Critics will simply argue that the "deeper value" Douglas points to is itself contested. Since the values underpinning human rights necessarily inform the interpretation of human rights, the interpretation of human rights should be carried out by the institution most likely to make a fair determination between competing conceptions of the justification of human rights.

Douglas cites another example of the problematic positivist approach taken by English courts' in delimiting who can possess human rights. The current approach, based on the common law definition of legal personhood, is said to obscure the importance of certain unsettled questions, such as the status of the foetus in human rights law (p.248). Unlike the prisoner voting example, the question of whether the foetus is a human rights-holder is not a matter of content disguised as a matter of possession, but is a genuine matter of rights possession. The pertinent question is whether the citation of dignity as the moral basis for human rights possession will assist in settling the status of the foetus. In my view, it will not. As noted in the section above, Douglas' placeholder conception of dignity leaves open the question of precisely who counts as human and what characteristic humans' value derives from. Douglas says that we possess human rights because of our deep intrinsic value. To reach a decision on whether foetuses have human rights, we would first have to specify the source of that deep intrinsic value, before assessing

[16] An argument accepted by the UK Supreme Court in: *R. v Horncastle* [2009] UKSC 14; [2010] 2 A.C. 373; [2010] 1 Cr. App. R. 17.

[17] Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (London: Ministry of Justice, 2012).

whether foetuses possess the relevant characteristic. This detailed specification would open the door to judges engaging in precisely the sort of moral speculation that Douglas is anxious to avoid. It follows that Douglas' proposal adds little to the approach currently adopted.

Conclusion

I agree entirely with the spirit underpinning Douglas' article. Human rights are moral rights first, legal rights second. Our human rights law should reflect the morality in which it is grounded, and draw on its justificatory force. But we cannot rely on the slogans of moral philosophy alone to end the precariousness of human rights law. If we want to persuade critics that rights matter, we must take their criticism seriously. Douglas' fundamentally fails to take criticism seriously: the idea that a rhetorical deployment of human dignity will help entrench the importance of human rights in the public consciousness condescends to critics with serious doubts about the nature, foundations, content, and practice of human rights. Douglas' proposal is analogous to telling an opponent of progressive taxation that they are wrong, because redistribution is demanded by "justice". Douglas does not address the thoughtful critic who honestly believes that justice recognises that inequality is justified, or that justice is not the heavily operative principle in questions of taxation. Douglas wants judges to tell critics they are wrong; I think we need to explain *why*. To persuade opponents that human rights law has moral primacy, we must explain why the protections human rights law provides are morally important. That explanation requires concerted engagement with the substance of human rights: we must ask what values, interests, or capacities human rights protect, and why those things are of supreme importance. If it is not appropriate for judges to answer these questions, justification falls to policy-makers and influencers. Politicians, academics, and other proponents of human rights must stop merely asserting the self-evident importance of human rights and start engaging with the serious moral arguments which underpin that assumption.

Tom Hannant
Doctoral Candidate, *School of Law, Queen Mary*

A legal basis for non-arbitrary detention: *Mohammed v Secretary of State for Defence*[1]

Afghanistan; Armed forces; Detention without charge; Lawfulness of detention; Military occupation; Right to liberty and security

The Court of Appeal decision of *Mohammed v Secretary of State for Defence*[2] has been described by government officials as yet another example of the misapplication of human rights on the battlefield and as further evidence of the fact that a new British Bill of Rights is required to prevent judicial interference with state activity

[1] Thanks to Henry Jones and Ruth Houghton for their suggestions. All errors remain my own.
[2] *Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843; [2016] 2 W.L.R. 247; [2015] H.R.L.R. 20.